



August 10, 2001

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-3511

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150569.

The Texas Department of Criminal Justice (the "department") received a written request for "all of the records surrounding the death of [a prison inmate], including autopsy reports, incident reports, investigative reports, medical records, and photographs." You state that, as of the date of your decision request to this office, the department has not yet received a copy of the deceased's autopsy report. You contend that the requested information currently held by the department is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, and 552.131 of the Government Code.

We note at the outset that the release of some of the records you submitted to this office as being responsive to the records request is governed by provisions outside the Public Information Act. Contained among the records at issue is a "Polygraph Report." Section 1703.306 of the Occupations Code governs the release of polygraph information and provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or control a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306. This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a). In this instance, it does not appear that the requestor has a right of access to the polygraph report. Accordingly, we conclude that the polygraph report is confidential pursuant to section 1703.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code.

You also submitted to this office an "Emergency Record" that appears to be a "medical record" governed by the Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Additionally, section 159.006(a) of the Occupations Code provides as follows:

Unless the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, a physician who receives a written consent for release of information *as provided by Section 159.005 shall furnish copies of the requested medical records*, or a summary or narrative of the records, including records received from a physician or other health care provider involved in the care or treatment of the patient. The physician shall furnish the information not later than the 30th day after the date of receipt of the request. [Emphasis added.]

Section 159.005(a)(5) provides that the "personal representative" of the deceased is one such individual entitled to authorize the release of the deceased's medical records. Additionally, the consent to release must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code § 159.005(b). We thus conclude that pursuant to section 159.006(a),

the department must release the medical records at issue upon receipt of a signed, written consent for the release of the records as provided by section 159.005.

Finally, you submitted an "Investigator's Report of Custodial Death." Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the Office of the Attorney General, who "shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party." In Open Records Decision No. 521 at 5 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, Part I of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, i.e., Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. Open Records Decision No. 521 at 5 (1989).

Because we could not identify any other documentation required under section 49.18, it is not clear that the "Investigator's Report of Custodial Death" you submitted to this office was intended to serve as the "custodial death report" required to be submitted to the Office of the Attorney General in compliance with section 49.18 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 49.18(c) (department required to submit custodial death report except where inmate died of natural causes or was lawfully executed, as provided by Gov't Code § 501.055(b)). In any event, we conclude that the department must release to the requestor all information required to be submitted to the Office of the Attorney General under Part I of the custodial death report.

We now address the applicability of the exceptions that you raised. Section 552.131 of the Government Code provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.131(a).¹ Section 552.131 is specifically made subject to section 552.029 of the Government Code, which provides in relevant part:

¹As of the date of this letter ruling, four different sections of the Act were denominated as section 552.131. Sections 552.131 and 552.029, relating to inmates of the department, were added to chapter 552 of the Government Code by the Act of May 26, 1999, 76th Leg., R.S., ch.783, §§ 1, 2, 1999 Tex. Gen. Laws 3407-08. However, effective September 1, 2001, section 552.131 relating to inmates of the department will be renumbered as section 552.134. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2812, § 21.001(53) (codified at Gov't Code § 552.134).

Notwithstanding . . . Section 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure[:]

. . .

(8) basic information regarding *the death of an inmate in custody*, an incident involving the use of force, or an alleged crime involving the inmate.

Gov't Code § 552.029(8) (emphasis added). Thus, the legislature explicitly made section 552.131 subject to section 552.029. The information at issue concerns an inmate who was confined in a facility operated by the department. Pursuant to section 552.029(8), "basic information" regarding the death of an inmate and an alleged crime involving an inmate is subject to required disclosure. The basic information that is subject to disclosure under section 552.029(8) includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. The information at issue comes within the purview of section 552.029(8). Accordingly, the department must release the basic information pertaining to both the inmate's death and the alleged crime involving the inmate pursuant to section 552.029 of the Government Code. However, the department must withhold all remaining information pertaining to the death pursuant to section 552.131, except as discussed above.²

In summary, the "Polygraph Report" must be withheld under section 1703.306 of the Occupations Code. The "Emergency Record" may be released only as permitted by the MPA. The department must release to the requestor Part I of the Custodial Death Report and all "basic information" regarding the death of the inmate and the crime involving the inmate. All remaining information at issue must be withheld from the public pursuant to section 552.131 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

²Because we resolve this aspect of your request under sections 552.029 and 552.131, we need not address the applicability of the other exceptions you raised.

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

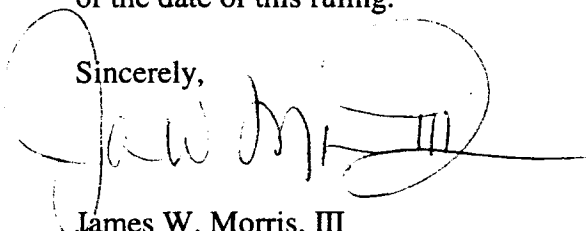
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J W Morris III', with a large, sweeping flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/seg

Ref: ID# 150569

Enc. Submitted documents

c: Mr. Thomas G. Kemmy
322 West Woodlawn Avenue
San Antonio, Texas 78212
(w/o enclosures)